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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROSARIO MARINELLO,

Plaintiff

vs

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant.

Case No. CV08-0664 JW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION'S MOTION
TO DISMISS THE COMPLAINT
[Fed.R.Civ.Proc Rule 12(b)(6)]**

Date:

Time: 9:00 a.m.

Ctrm: 8

Judge: Hon. James Ware

I. INTRODUCTION

Plaintiff Rosario Marinello's complaint alleges a single cause of action under Title VII of the Civil Rights Act for retaliation. Title VII requires that a plaintiff file a civil action within ninety (90) days after the Equal Employment Opportunity Commission ("EEOC") notifies the claimant of his/her right to do so. Plaintiff alleges that he received a right-to-sue notice from the EEOC on or about October 10, 2007. However, this action was commenced on January 25,

1 2008, seventeen (17) days after the 90-day limitations period ran. On this basis alone, plaintiff's
2 action should be dismissed. *Gonzalez v. Stanford Applied Engineering, Inc.*, 597 F.2d 1298,
3 1299 (9th Cir. 1979) (affirming the dismissal of a Title VII claim filed on the 91st day after the
4 notice of right to sue was given on the grounds that the action was untimely).

5 Further, plaintiff's complaint is devoid of any factual allegations that would give rise to a
6 Title VII cause of action. Though plaintiff concludes he was subject to retaliation for engaging
7 in protected activities, he fails to identify any facts supporting this belief. Construed even in the
8 broadest manner, the complaint is devoid of any facts identifying *any* protected activity. What
9 plaintiff apparently alleges is that his ability to be promoted and to be reinstated to his former
10 position was impeded by an internal affairs investigation of him, and that the internal
11 investigation relied on falsehoods. The Ninth Circuit has held that no Title VII protection exists
12 for false charges made in an employer's internal proceeding. *Vasconcelos v. Meese*, 907 F.2d
13 1171, 1776 (9th Cir. 1990).

14 Accordingly, the complaint is fatally defective in such a manner that no amendment can
15 cure.

16 II. STANDARD OF REVIEW

17 A dismissal under Rule 12(b)(6) is proper "if it is clear that no relief could be granted
18 under any set of facts that could be proved consistent with the allegations." *Hishon v. King &*
19 *Spalding*, 467 U.S. 69, 73 (1984).

20 Recently, the Supreme Court specifically overruled the outdated standard that a
21 complaint should not be dismissed under Rule 12(b)(6) unless it appears "beyond doubt" that
22 plaintiff can prove no set of facts supporting the claim which would merit relief, characterizing
23 that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading
24 standard. *Bell Atlantic Corp. v. Twombly*, __ U.S. ___, 127 S. Ct. 1555, 1569 (2007) (overruling
25 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations and quotations omitted).

1 The standard now emphasized by the Supreme Court requires factual allegations to “be
2 enough to raise a right to relief above the speculative level on the assumption that all the
3 allegations in the complaint are true.” *Id.* at 1964-65. Therefore, to properly state a claim,
4 plaintiff’s complaint must provide more than unwarranted deductions of fact, unreasonable
5 inferences and unsupported statements of conclusions.

6
7 **III. PLAINTIFF’S COMPLAINT IS TIME-BARRED BECAUSE HE FAILED TO**
8 **COMMENCE THIS ACTION WITHIN NINETY DAYS OF BEING GIVEN**
9 **THE RIGHT-TO-SUE NOTICE**

10 In a Title VII action, a plaintiff has 90 days from the date a right-to-sue notice is given by
11 the EEOC to commence a civil action based on the charges filed. 42 U.S.C. §2000e-5(f)(1).
12 This filing period is a statute of limitations. *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (citations
13 omitted); *see also Gonzalez v. Stanford Applied Engineering, Inc.*, 597 F.2d 1298, 1299 (9th Cir.
14 1979) (affirming the dismissal of a Title VII claim filed on the 91st day after the right-to-sue
15 notice was given on the grounds that it was untimely).

16 Plaintiff filed this action 107 days after the date he allegedly received the right to sue
17 notice. He alleges that he received from the EEOC a Notice of Right to Sue letter on or about
18 October 10, 2007. (Complaint, ¶ 9, pg. 3, lines 3-4.) He failed to commence this action by
19 January 8, 2008, the last day he could file this complaint within the 90-day period. Instead, he
20 filed the complaint on January 25, 2008, and provided no justification for this seventeen day
21 delay.¹

22
23 Consequently, this action should be dismissed as untimely. Because this defect cannot be
24 cured by amendment, it would also be futile to allow plaintiff leave to amend.

25
26 ¹ A copy of the Notice of Right to Sue, as attached to the complaint, is dated October 10,
27 2007 and delivered via certified mail. Even with the presumption that delivery was made on
28 October 13, 2008, three days after the issuance of the notice, plaintiff’s complaint remains
untimely filed. *See Baldwin County Welcome Ctr. V. Brown*, 466 U.S. 147, 148 (1984)
(adopting a rebuttable presumption of delivery three days after the 90-day notice was issued).

IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE VII BECAUSE HE DOES NOT ALLEGE THAT HE WAS ENGAGED IN A PROTECTED ACTIVITY NOR DOES HE ALLEGE ANY INTENTIONAL MISCONDUCT BY THE DEFENDANT

To establish a Title VII retaliation claim, plaintiff must show that (1) he was engaged in a protected activity, (2) his employer subjected him to an adverse employment action, and (3) a causal link exists between the protected activity and the employer's action. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 506.

Plaintiff's complaint fails to allege that he was engaged in any protected activity. He also fails to allege a causal link between any protected activity and his inability to secure a position with the CDCR. Rather, he alleges that he was withheld from the promotional list because of "[i]ncorrect information" (Complaint, ¶ 6, pg. 2, line 19), and was not reinstated because he was the subject of an "Internal Affairs investigation" that was based on false allegations (Complaint, ¶ 6, pg. 2, lines 23-24). He does not allege any facts as to why he believes his involvement with the internal investigation was a protected activity, or allege that the investigation itself was discriminatory in any way.

An activity is protected under Title VII only if it involves participation in an investigation, proceeding, or hearing under Title VII (such as an EEOC investigation) or opposition to any employment practice that is unlawful under Title VII. 42 U.S.C. §2000e-3(a). For example, the First District affirmed the dismissal of a Title VII retaliation action premised on participation in union activities. *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186, 194 (1st Cir. Mass. 1990) (holding that plaintiff failed to specify any particular prohibited practices that he opposed or sought to change where reason for participation was allegedly unfair labor practice and not discrimination).

1 Applying a similar rationale to a more colorable claim, the Ninth Circuit affirmed the
 2 dismissal of a Title VII retaliation action against an employee who was dismissed for lying
 3 during an internal investigation of sexual harassment charges she made. *Vasconcelose v. Meese*,
 4 907 F.2d 111, 113 (9th Cir. 1990). In that case, the plaintiff alleged that her termination for lying
 5 during the internal investigation violated Title VII because statements made during the
 6 investigation, whether truthful or not, is a protected activity. *Id.* The Court rejected that
 7 argument, holding that while accusations made in the context of charges before the EEOC are
 8 protected, charges made outside of that context are not. *Id.*

10 In this case, the nature of the internal affairs investigation does not fall under a Title VII
 11 protected activity; i.e., plaintiff does not allege the investigation involved discriminatory or
 12 harassment claims made by him or his co-workers. He merely claims that the investigation was
 13 based on third-party falsehoods. Such allegation is insufficient to state a retaliation cause of
 14 action under Title VII. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361
 15 (11th Cir.1999) (noting that the court is not concerned with whether employment decision was
 16 prudent or fair but only whether it was motivated by unlawful discriminatory animus).²

18 Accordingly, this complaint should be dismissed.

19 **V. CONCLUSION**

20 For the foregoing reasons, defendant State of California Department of Corrections and
 21 Rehabilitation respectfully requests that this court grant defendant's Motion to Dismiss the
 22 Complaint in its entirety without leave to amend.
 23

27 ² Because plaintiff does not even make the allegation that the internal affairs investigation is a protected activity,
 28 any discussion about plaintiff's reasonable and good faith belief that the investigation was discriminatory, harassing
 or retaliatory under the ambit of Title VII would be premature. *See Trent v. Valley Elec. Ass'n Inc.*, 41F.3d 524, 526
 (9th Cir. 1994) (Title VII liability exists where plaintiff had a reasonable and good faith belief that the incident
 constituted unlawful sexual harassment).

1 Dated: May 1, 2008

Respectfully submitted,

2 EDMUND G. BROWN JR.
3 Attorney General of the State of California
4 MIGUEL A. NERI
5 Supervising Deputy Attorney General
6 FIEL D. TIGNO
7 Supervising Deputy Attorney General

8 /s/
9 DAVID PAI
10 Deputy Attorney General

11 Attorneys for Defendant
12 California Department of Corrections and
13 Rehabilitation
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Rosario Marinello v. California Department of Corrections and Rehabilitation***

U. S. District Court, Northern District, Case No.: 5:08-CV-00664-JW

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is P.O. Box 70550, Oakland, CA 94612-0550.

On May 1, 2008, I served the attached:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S MOTION TO DISMISS THE COMPLAINT
[Fed.R.Civ.Proc. Rule 12(b)(6)

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Rosario Marinello
In Pro Per
266 Reservation Road, #F-232
Marina, CA 93933

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 1, 2008, at Oakland, California.

ELVIA GRANADOS

Declarant

/S/

Signature